No. 670

In the Supreme Court of the United States

OCTOBER TERM, 1946

ADDISON MILLER, A. [illegible]
FALTICO, PARTNERS [illegible]
MILLER COMPANY, A [illegible]
NORTHERN [illegible] COMPANY
LEE, INC. (ILLINOIS) [illegible]

L. METCALFE WALLING, ADMINISTRATOR [illegible]
WAGE AND HOUR DIVISION, [illegible] DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [illegible] CIRCUIT

BRIEF FOR THE RESPONDENT [illegible]

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ADDISON MILLER, A. T. MILLER, AND GEORGE FALTICO, PARTNERS DOING BUSINESS AS ADDISON MILLER COMPANY; ADDISON MILLER, INC.; GREAT NORTHERN ICING COMPANY, AND ADDISON MILLER, INC. (ILLINOIS), PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The "memorandum order" of the district court (R. 39) is reported in 47 F. Supp. 1004. The opinion of the circuit court of appeals (R. 134–142) is reported in 138 F. (2d) 629.

JURISDICTION

The judgment of the circuit court of appeals was entered November 9, 1943 (R. 143). The

petition for writ of certiorari was filed February 4, 1944. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended.

QUESTION PRESENTED

In a suit by the Administrator of the Wage and Hour Division, under Section 17 of the Fair Labor Standards Act, the district court entered on consent of all parties a decree restraining violations of the Act and requiring petitioners to pay restitution to their underpaid employees. The question is whether the provision ordering restitution was void for lack of jurisdiction.

STATUTE INVOLVED

The statutory provision involved is Section 17 of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 217. The pertinent part of this section provides—

> The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown * * * to restrain violations of section 15.

STATEMENT

In July 1941 the Administrator of the Wage and Hour Division, United States Department of Labor, filed a complaint in the district court (R. 1) to enjoin petitioners from violating the Fair Labor Standards Act. Pursuant to stipulation

between the parties, the petitioners entered a general appearance, waived service of process and consented to the immediate entry of a judgment (R. 10–12). This stipulation and consent contained an agreement by petitioners to pay restitution to employees for previous failure to compensate them in accordance with the Act (R. 10–12). At the time of the entry of judgment the court made specific inquiry of petitioners' counsel to ascertain whether all the petitioners had been fully advised of the nature and purpose of the judgment and whether their assent was given with full understanding of what was required of them (R. 36). Counsel replied that the matter had been discussed at several conferences, and that they were "fully familiar with the obligations of the Stipulation" (R. 36). Accordingly, the district court entered a judgment which restrained violations of the Act and directed that the stipulation between the parties be incorporated in and made a part of the judgment, and that "defendants [petitioners] do and perform each and every act and thing set forth in said stipulation" (R. 16).

On January 14, 1942, petitioners filed a motion to vacate the consent judgment entered July 17, 1941 (R. 18). Petitioners urged a number of grounds for vacating the judgment (R. 40), chief among which was that the court lacked jurisdiction in a suit by the Administrator to order restitution

of wages due under the Act (R. 26). Holding that it "had jurisdiction over the general subject matter of the action and of the parties to it" (R. 53), the district court denied the other relief requested by the petitioners, but vacated that part of the judgment which directed the payment of restitution.

Respondent then appealed from the order modifying the judgment entered July 17, 1941 (R. 55). Petitioners did not appeal from the portions of the order adverse to them (R. 136). Consequently, the only question before the circuit court of appeals was whether the district court erred in modifying the consent judgment on the ground that it lacked jurisdiction to grant restitution.

The circuit court of appeals concluded that the district court, at the time the consent judgment was entered, had general jurisdiction of the subject matter and of the parties (R. 137), and that even if the Administrator were not authorized to maintain a suit for restitution, the "inclusion of the order for restitution in the consent decree did not go to the jurisdiction or power of the court but to the merits only" (R. 138). The court held that the question whether the Administrator "has the requisite standing" to obtain such relief goes "only to the capacity of the plaintiff and to the remedy, not to the power of the court" (R. 141). Accordingly, the court reversed that part of the order of the district court which vacated the provision for restitution.

ARGUMENT

If a court has jurisdiction of the general subject matter and the parties, a consent decree may not be set aside for ordinary errors of law or "error in decision"; and "even gross error in the decree" is no cause for vacating it. *Swift & Co.* v. *United States,* 276 U. S. 311, 330. A consent "decree * * * is always affirmed, without considering the merits of the cause." *Nashville Ry. Co.* v. *United States,* 113 U. S. 261, 266, quoted with approval in the *Swift* case at page 324.[1] The reason is that errors in decisions are "waived by the consent to the decree" (*Swift* case, pp. 327, 331).

This rule governs the instant case. The question whether the Administrator may secure, in addition to an injunction restraining future violations, an order directing the defendant to make restitution to employees of back wages due under the Act does not go to the jurisdiction of the court. Jurisdiction is, of course, a word of variable meaning. In the *Swift* case the Court held that a consent decree could not be set aside because of error if the district court "had jurisdiction both of the general subject matter—enforcement of the Anti-Trust Act—and of the

[1] This principle applies whether the attack is by motion to vacate as in the *Swift* case, or by an appeal or bill of review. In the *Nashville Ry.* case, 113 U. S. 261, this Court ruled that a consent decree could not be reversed on the merits on appeal. To the same effect see *Thompson* v. *Maxwell,* 95 U. S. 391, 397, holding that a bill of review will not lie against a consent decree.

parties" (276 U. S., at 326). The question was raised in that case as to the existence of a case or controversy, an issue undoubtedly going to the Court's "jurisdiction" under Article III of the Constitution; yet an erroneous ruling on that point was held to be correctible "only by an appeal or by a bill of review" (*ibid.*). In the present case petitioners' appearance and consent to the entry of the decree conferred jurisdiction over the parties, and the court also had jurisdiction over "the general subject matter", the enforcement of the Fair Labor Standards Act.

Petitioners' present contention that the decree entered in the exercise of this jurisdiction was too sweeping does not present a jurisdictional question. The restitution remedy, if not literally within the power "to restrain violations,"[2] is certainly sufficiently related to the restraint of violations to be an exercise, even if erroneous, of the power to enjoin. The *Swift* case itself demonstrates[3] that questions as to the scope of a

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[2] In his concurring opinion below, Judge Woodrough took the position that "the violation continues as long as they [the employers] continue the withholding and refusal to pay according to law" for past workweeks. Hence, he concluded, the inclusion of the restitution provision in the consent decree was not erroneous. (R. 141–142.) See to the same effect *Fleming* v. *Alderman*, 51 F. Supp. 800 (D. Conn.). For the reasons stated in the text, we believe it unnecessary for the Court to pass upon this question.

[3] Thus, in the *Swift* case it was contended that the decree applied to intrastate transactions, and that since there was no finding as to their relationship to interstate commerce,

decree are not jurisdictional, for the court there stated that "The power to enjoin includes the power to enjoin too much" (*id.*, at 331).

The essence of petitioners' argument is that the Administrator has no standing in an injunction suit to seek restitution of amounts due employees under the Act. The contention is that since Section 16 (b) authorizes employees to sue for damages, the provision in Section 17 empowering the district courts to restrain violations at the suit of the Administrator (see Sec. 11 (a)) cannot be construed as authorizing an order of restitution. But if this point had been contested in the present suit, the district court undoubtedly would have had jurisdiction to decide whether only the employees, and not the Administrator, could sue for restitution.[4]

General Investment Co. v. *New York Central R. R.*, 271 U. S. 228, is directly in point. There a stockholder was suing to enjoin a railroad consolidation as in violation of the antitrust laws. The district court held that various sections of the antitrust laws and the Interstate Commerce Act lodged the right to maintain such a bill

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that portion of the decree was a nullity (pp. 330–331), and that the decree was too comprehensive in that it enjoined defendants from engaging in conduct not prohibited by the Anti-Trust Act (pp. 328–330).

[4] It should be noted that the simple restitution of unpaid wages required by the decree is not the equivalent of the remedy in Section 16 (b), which permits employees to recover double damages as well as attorneys' fees.

exclusively in the public authorities, and dismissed the bill for want of jurisdiction (271 U. S., at 231). This Court held that such questions "pertain to the merits, not to jurisdiction" (*ibid.*), and stated (pp. 230–231):

> By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits (*The Fair* v. *Kohler Die Co.*, 228 U. S. 22, 25; *Geneva Furniture Co.* v. *Karpen*, 238 U. S. 254, 258,) *as where the plaintiff seeks preventive relief against a threatened violation of law of which he has no right to complain*, either because it will not injure him or *because the right to invoke such relief is lodged exclusively in an agency charged with the duty of representing the public in the matter.* Whether a plaintiff seeking such relief has *the requisite standing* is a question going to the merits, and its determination is an exercise of jurisdiction. *Illinois Central R. R. Co.* v. *Adams*, 180 U. S. 28, 34; *Venner* v. *Great Northern Ry. Co.*, 209 U. S. 24, 34. [Italics supplied.]

In the *General Investment* case the argument was that specific statutory remedies given the public authorities deprived a private person of standing to sue. Here the contention is the con-

verse. But this difference is obviously inconsequential insofar as the jurisdictional nature of the question is concerned. In both cases the issue is whether the plaintiff has "the requisite standing" (271 U. S., at 230), not whether the subject matter of the case or the type of relief is within the power of the court. Hence, in the instant case the inclusion of the restitution provision was at most an erroneous exercise of the jurisdiction which the court possessed. See also *Chicot County Dist.* v. *Bank,* 308 U. S. 371; *Illinois Central R. R. Co.* v. *Adams,* 180 U. S. 28; *Venner* v. *Great Northern Railway,* 209 U. S. 24; *Foltz* v. *St. Louis and S. F. Ry. Co.,* 60 Fed. 316 (C. C. A. 8); *Brougham* v. *Oceanic Steam Navigation Co.,* 205 Fed. 857 (C. C. A. 2); *Thompson* v. *Terminal Shares,* 89 F. (2d) 652 (C. C. A. 8); *Montgomery* v. *Equitable Life Assur. Soc.,* 83 F. (2d) 758 (C. C. A. 7).

The cases cited by petitioners are clearly inapposite. Not one of them presented the question of the validity of an unappealed or consent judgment. In *Globe Newspaper Co.* v. *Walker,* 210 U. S. 356, this Court held that the copyright statutes grant no right to recover damages for infringement of the copyright of a map and therefore that the action was not one which "arose under the copyright laws of the United States, whereof the Circuit Court * * * had jurisdiction" (210 U. S., at 361). Accordingly, the

judgment of that court awarding damages was reversed and the action ordered dismissed "for want of jurisdiction," 210 U. S., at 367. But the jurisdiction which was wanting in the *Globe* case was jurisdiction of the trial court as a federal court, not jurisdiction of the general subject matter or the parties. The judgment there would not have been subject to collateral attack if unappealed. Want of federal "jurisdiction," like other errors of law or decision, does not render a district court's judgment void.[5] Moreover, because of Sections 16 and 17 of the Act, the present action, unlike the *Globe* suit, was unquestionably one within the jurisdiction of the federal district courts. The other decisions cited by petitioners are even further afield.

The cases under the Fair Labor Standards Act are in accord with the decisions below. They hold that judgments requiring the payment of restitution to underpaid employees may be enforced by punishing for contempt employers who have failed to make such payments in accordance with the court's decree. *Fleming* v. *Warshawsky & Co.*, 123 F. (2d) 622 (C. C. A. 7); *Fleming* v. *Alderman*, 51 F. Supp. 800 (D. Conn.).

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[5] *Chicot County Dist.* v. *Bank*, 308 U. S. 371, 376, which quotes *McCormick* v. *Sullivant*, 10 Wheat. 192, 199, as follows: "If the [federal ground of] jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. But they are not absolute nullities."

CONCLUSION

The decision of the circuit court of appeals is in accord with the applicable decisions of this Court and with pertinent decisions of other circuits. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944